

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6307 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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BIKHUMIYA SARFUMIYA MALEK

Versus

DDO MEHSANA

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Appearance:

Dr.Mukul Sinha for

MR RC JANI for Petitioner

Mr.B.Y.Mankad, learned A.G.P. for respondents.

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CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 26/07/1999

ORAL JUDGEMENT

1. Petitioner herein was an elected Sarpanch of Gram Panchayat Jethlaj, Taluka Kalol, District - Mehsana from 23.2.92 to 22.2.97. He contested the election for the office of the Sarpanch for the second time and was again elected for a period of 5 years for the term commencing on 2.3.97. The petitioner has come with the case that one Ajit Mana Parmar had contested the said election against the petitioner for the office of the Sarpanch in

1997 but he lost against the petitioner. It is also the case of the petitioner that said Ajit Mana Parmar was also a member of the Panchayat in the earlier term and on the complaint filed by the petitioner he had been placed under suspension in the earlier term on the allegations of misappropriation and irregularities. It is further alleged that brother of complainant Ajit Mana Parmar was also Secretary of the Dudh Utpadak Mandal wherein the petitioner was also a member of the said Committee. There also he had brought out the irregularities of the said Secretary i.e. brother of Ajit Mana Parmar and, therefore, the said Secretary of Dudh Utpadak Mandal was also removed as a member of the said Mandal. The petitioner has also stated that one Shri Dashratbhai Manabhai Parmar filed a motivated complaint against the petitioner and others on 12.10.97 at Police Station, Kalol and on that basis the case was registered by the Police for investigation. While the investigations were going on, the District Development Officer issued a notice on 26.11.97 under S.59(1) of the Gujarat Panchayats Act alleging therein that a complaint being F.I.R. No.303/97 was lodged under Sections 324, 504, 506(2) and 114 of the I.P.C. and under S.135 of the Bombay Police Act and also under S.3(1) of the Atrocities Act and, therefore, action was required to be taken under S.59(1) of the Gujarat Panchayats Act against the petitioner. He may, therefore, remain present for making any written or oral submission on 8.12.97 before the District Development Officer and he had also appeared before the District Development Officer, but the District Development Officer passed the order dt.12.1.98 whereby the petitioner was ordered to be removed from the office of the Sarpanch for the offence of moral turpitude under S.59(1) of the Gujarat Panchayats Act. Against this order dt.12.1.98 the petitioner approached the Addl. Development Commissioner who by his order dt.3/4-5-98 dismissed the Appeal and vacated the order of status quo which had been earlier passed by him on 23.1.98 and confirmed the order passed by the District Development Officer on 12.1.98. Against this order dt.3/4-5-98 passed by the Addl. Development Commissioner the petitioner preferred Special Civil Application No.3967/98, which was decided by this Court on 23.6.98 whereby the Court ordered that the petitioner may apply to the Addl. Development Commissioner to re-consider the order passed by him in the light of the material on record including the medical record and the officer will decide the application after appropriate scrutiny under S.59(1) of the Act. In the order dt.23.6.98 passed by the Court, it was also noted in paras 3,4 and 5 as under:-

"3. Shri Anand, learned counsel relied upon a judgment of S.D.Shah,J in Ranjibhai Morbhai Patel v. Additional Development Commissioner and another, 1992(2) GLR 1204, which relies upon an earlier judgment of the Bombay High Court in Emperor v. Karsan Jesang and others, AIR 1941 Bom.414 on the question as to what is moral turpitude. He also relied upon a judgment of N.N.Mathur,J in Narabhai Veljibhai Chaudhary v. R.S. Vaghela and others, 1997 (1) GLR 599. As against that Shri P.K. Jani for respondent no.1 relied upon a Division Bench Judgement reported in 1997 (2) GLH (UJ) 22, which states that under sec.59(1) of the Gujarat Panchayats Act, 1993 ("the Act" for brevity) only two ingredients are to be looked into; one is whether there is a criminal proceeding and secondly whether moral turpitude is alleged. Shri Anand, learned counsel led great emphasis on the judgment of N.N.Mathur, J, wherein the facts were some what similar. That was the case where the medical record was looked into at appellate level and the appellate officer has held that the injury was just not possible. That view was upheld by N.N.Mathur, J. Relying on this, Shri Anand submits that the document which he has tendered and other medical record be directed to be looked into once again.

4. Without entering into the legal niceties and in view of substantial similarities between the facts of this case and the one before N.N.Mathur,J, the petitioner will apply to respondent no.2 - Additional Development Commissioner to reconsider the order that he has passed in the light of the material on record including the medical record and the officer will decide the application after appropriate scrutiny under sec.59(1) of the Act.

5. Although the impugned order was passed much earlier it is the say of the petitioner that he continues to be in charge of the office of the Sarpanch. Shri Jani, learned advocate states that only due to pending proceedings that the charge has not been taken. It is, therefore, directed that the petitioner will hand over charge of the office to Upa Sarpanch under sec.59(2) of the Act during the pendency of the reopened proceedings before respondent no.2. Inasmuch as the petitioner is keen to continue as Sarpanch and also inasmuch as it is his case that the allegations are false, respondent no.2 will consider the reopened matter and decide it afresh at the earliest and in any case by the end of July 1998. Needless to say that if the petitioner succeeds, the charge will be handed over back to him."

Thus the matter stood re-opened before the Addl. Development Commissioner, who then passed the order dt.24.7.98 whereby the order, earlier passed by the District Development Officer, had again been confirmed and the petitioner's Appeal was rejected.

2. Aggrieved from this order dt.24.7.98 the present Special Civil Application was preferred on 4.8.98 in which notice was issued on 5.8.98 and thereafter Rule was issued on 19.8.98, but the interim relief was declined at that stage.

3. The petitioner then moved a Civil Application No.5855/99 and in this Civil Application after hearing both the sides an order was passed on 28.6.99 that the Civil Application may be listed alongwith the main matter and the same may be finally heard and decided as prayed by both the sides and this is how the matter has come up for final hearing today as ordered in the Civil Application on 28.6.99.

4. No reply has been filed on behalf of the respondents and Mr. Mankad, learned A.G.P., has submitted that since this is a petition under Article 227 of the Constitution of India, no reply is required to be filed by the respondents.

5. I have heard learned counsel for both the sides. It is given out by Dr. Mukul Sinha, under the instructions of his client, who is present in the Court, that after the filing of the Challan by the Police in the Court in the aforesaid criminal case against the petitioner, no effective proceedings whatsoever have taken place and uptill this date even charge has not been framed against the petitioner in the said criminal case.

6. So far as the provisions of S.59, under which the action has been taken against the petitioner, are concerned, it deals with the case of suspension of Sarpanch or Upa-Sarpanch. So far as question of removal is concerned, there is provision under S.57. Sections 57 and 59 are reproduced as under:-

"57. Removal from office.-(1) The competent authority may remove from office any member of the panchayat, the Sarpanch or, as the case may be, the Upa-Sarpanch, thereof, after giving him an opportunity of being heard and giving due notice in that behalf to the panchayat and after such inquiry as it deems necessary, if such member, Sarpanch or, as the case may be,

Upa-Sarpanch has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct or abuses his powers or makes persistent default in the performance of his duties and functions under this Act or has become incapable of performing his duties and functions under this Act. The Sarpanch or, as the case may be, the Upa-Sarpanch, so removed may at the discretion of the competent authority also be removed from the membership of the panchayat.

(2) The competent authority may, after following the procedure laid down in sub-section (1) disqualify for a period not exceeding five years any person who has resigned his office as a member, Sarpanch or Upa-Sarpanch, or otherwise ceased to hold any such office and has been guilty of misconduct specified in sub-section (1) or has been incapable of performing his duties and functions:

Provided that an action under this sub-section shall be taken within six months from the date on which the person resigns or ceases to hold any such office.

(3) Any person aggrieved by an order of the competent authority under sub-section (1) or (2) may, within a period of thirty days from the date of communication of such order, appeal to the State Government."

#### "59. Suspension of Sarpanch or Upa-Sarpanch.-(1)

The District Development Officer may suspend from office the Sarpanch or the Upa-Sarpanch of a village panchayat against whom any criminal proceedings in respect of an offence involving moral turpitude have been instituted or who has been detained in a prison during trial for any offence or who is undergoing such sentence of imprisonment as would not disqualify him from continuing as a member of the panchayat under section 30 or who has been detained under any law relating to preventive detention for the time being in force.

(2) Where any Sarpanch or Upa-Sarpanch, has been suspended under sub-section (1), another member of the village panchayat shall, subject to the conditions to which the election of the Sarpanch or Upa-Sarpanch, so suspended was subject, be elected to perform all the duties and exercise all the powers of a Sarpanch or Upa-Sarpanch, during the period for which such suspension continues.

(3) An Appeal shall lie against an order passed under sub-section (1) to the State Government. Such appeal shall be made within a period of thirty days from the date of the order."

7. Even if it is taken that the said Section has been wrongly mentioned and the provision, under which the order is required to be passed for the purpose of removal, is Section 57, it is clear that scope of the two Sections for the purpose of removal and suspension are entirely different. For the purpose of removal, the presence of guilt or misconduct in the discharge of duties or of any disgraceful conduct or abuse of powers or making persistent default in the performance of duties and functions or that the Sarpanch has become incapable of performing his duties and functions under the Act are the necessary pre-conditions. So far as pendency of any criminal case is concerned for suspension that is provided in S.59 and that too when criminal proceedings in respect of offence involving moral turpitude are instituted. It appears that the impugned order, even for the second time, has been passed by the concerned authority without addressing itself to the grounds, which are germane to the passing of the orders of removal, and the order proceeds on the basis that the petitioner was involved in an offence involving moral turpitude. This Court while passing the earlier order while deciding Special Civil Application No.3967/98 on 23.6.98 had categorically mentioned in para 4 that, " Without entering into the legal niceties and in view of substantial similarities between the facts of this case and the one before N.N.Mathur,J, the petitioner will apply to respondent No.2 Additional Development Commissioner to reconsider the order that he has passed in the light of the material on record including the medical record and the officer will decide the application after appropriate scrutiny under sec.59(1) of the Act." Reference was made to the case before Hon'ble N.N.Mathur,J in the case of Narabhai Veljibhai Chaudhary v. R.S. Vaghela and others, reported in 1997(1) GLR 599. This Court had categorically mentioned that the Officer will decide the application after proper scrutiny under S.59(1) of the Act. It appears that the Addl. Development Commissioner has not even cared to go through the order passed by this court on 23.6.98 while deciding Special Civil Application No.3967/98 and he has again confirmed the order passed by the District Development Officer, which has been passed under S.59 removing the petitioner from the office of the Sarpanch whereas S.59 deals with the case of suspension and the Addl. Development Commissioner has not discussed any of the

ingredients of S.57 while passing the impugned order dt.24.7.98. It appears that the author of the impugned order has not even considered that Section 57 deals with the cases of removal and Sec.59 deals with the cases of suspension.

8. Besides this, in the facts and circumstances of this case, I find that in the case of N.V. Chaudhary v. R.S. Vaghela (Supra) it was considered as to what will constitute the offence involving moral turpitude. No rule of universal application can be laid down that every criminal case will essentially be a case of an offence involving moral turpitude. It would depend upon the facts and circumstances of each and every case and the background in which the offence is committed. In a given case, even an offence under S.302, may not be an offence involving moral turpitude. For example a son witnesses that his mother or sister or wife is being molested or raped and he is not able to control himself and kills the culprit, it will not at all be a case of offence involving moral turpitude. In N.V.Chaudhary v. R.S.Vaghela (Supra) it has been considered and held as under:-

"Thus, a Sarpanch cannot be suspended just on institution of Criminal Case. Whether the act constitute an offence of moral turpitude, there cannot be a strait-jacket formula. It depends on various factors including the manner and circumstances in which the offence alleged to have been committed. The rule of suspension of a person holding public office is based on a public policy to maintain purity in public life. A person facing charge of offence of moral turpitude should be barred from holding public office. However this power in current aggressive competitive politics must be exercised with great circumspection. While criminalisation in public life is not unknown, the false implication has also become hazards of public life. This has put more pressure on the Judiciary to scrutinise such cases with more care and caution. It is true that it will not be for the Court to enter into the merits of the case, but still it is desirable to undertake brief scrutiny of the facts to rule out any chance of false implication."

9. Keeping in view all the facts in the case of N.V.Chaudhary v. R.S.Vaghela (Supra) and the fact that this Court on 23.6.98 (Coram:H.L.Gokhale,J) while deciding Special Civil Application No.3967/98 had made certain observations that there were substantial similarities between the facts of this case and the one

before Hon'ble N.N.Mathur, J (N.V.Chaudhari v. R.S.Vaghela - Supra), it is quite shocking that even such weighty observations made by this court have been ignored by the Addl. Development Commissioner and he has still passed the order on the same reasoning without taking note of the order passed by this court on 23.6.98. Even otherwise in such matters, when the tenure of the elected office bearer is sought to be interfered with, the authority, who is charged under the Act to exercise the power, has to take care and scrutinise the allegation with great care and caution. In such cases, the parties may, in a given case, level allegations so as to involve the elected person in a criminal case with the allegations involving criminal liability and may go to the extent of levelling the allegations involving moral turpitude so as to settle their score and, therefore, such orders could not be passed in a casual manner, i.e. the manner in which the orders have been passed in the present case without making proper scrutiny either with regard to the facts or with regard to the relevant provisions of law.

10. I do not wish to express any opinion about the allegations in the criminal case as the matter is yet to come up before the Criminal Court for the purpose of framing charge and, therefore, nothing said or observed in this judgment shall be used to the prejudice or in favour of any of the parties, but the fact remains that even till this date the charge has not been framed by the Court against the petitioner, while the matter is pending for last more than two years. In such cases, when even the charge-sheet has not been prepared, merely on the basis of the challan, which has been filed, the petitioner could not be deprived of the tenure of his elected office i.e. office of Sarpanch without objective scrutiny of the allegations to see as to whether there was any element of moral turpitude.. The orders of petitioner's removal cannot be said to have been passed in conformity with the provisions of S.57 of the Gujarat Panchayats Act and it is clear on the basis of the contents of the impugned order dt.24.7.98 and the earlier order, which had been passed on 12.1.98, by the District Development Officer that both these orders have been passed without active application of mind and the authorities have not even addressed themselves to the relevant considerations under the relevant provisions of law and the said orders can not be sustained in the eye of law, more particularly when the Addl. Development Commissioner while passing the order dt.24.7.98, subsequent to this Court's order dt.23.6.98, has not shown due regard even for the orders passed by this



court. The order dated: 24.7.98 passed by the Addl. Development Commissioner read with the order dt.12.1.98 passed by the District Development Officer against the present petitioner are hereby quashed and set aside. In case the petitioner has already been deprived of the charge of the office of Sarpanch, the charge shall be immediately restored to the petitioner forthwith as if the impugned orders for his removal had never been passed against the petitioner. This Special Civil Application is accordingly allowed and the rule is made absolute. The petitioner shall also be entitled to the cost of Rs.10,000/- (Rupees ten thousand only).